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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-111

GLORIA M. LOHMAN,

Respondent,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

and

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE COMPANY AS STATUTORY RECEIVER OF CEDAR VALE NATIONAL BANK,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I.

1. Did the Court below err in holding that the District Court (1) had jurisdiction to set aside its former order of

dismissal and (2) did not abuse its discretion in setting aside the order of dismissal as "void", after the appeal from the dismissal had been dismissed, and acting on its own motion, and without any finding as to why the former order of dismissal was "void"?

Respondent talks on Page 5 of her Opposition Brief of "the motion for relief under Rule 60(b), " which is misleading. The fact is respondent never made any motion for relief under Rule 60(b). Her motion was a simple "Motion to Amend" which asked the District Court "to provide that it [the dismissal order of April 19, 1971, under Rules 37 and 41(d) F.R.C.P.] is not a judgment on the merits ...."

The Court did not respond to a Rule 60(b) motion. It simply held, on the basis of the plaintiff's Motion to Amend, that under Rule 60(b) its order April 19, 1971, was void, without ever stating the basis for its jurisdiction to amend the order, or the reasons upon which it held the April order was void.

We thus urge that plaintiff's Motion to Amend, and the Court's order which purported to act under Rule 60(b), were not effective. The Court stated an unfounded conclusion that its prior order of dismissal was void, but with no basis for the finding—either stated or unstated.

The opinion of the Eighth Circuit finds that the District Court specified in its dismissal order, in accordance with the provisions of Rule 41(b), that the dismissal was not on the merits "by finding that plaintiff had failed to comply with the Court's order to compel plaintiff to answer interrogatories, as ordered pursuant to Rules 37 and 41(b) of the Federal Rules of Civil Procedure."

This is also a non sequitur which hangs suspended in space with nothing to support it from either above or be-

low. Although the April 19, 1971, order did state that the dismissal was on account of plaintiff's failure to comply with the discovery orders, it clearly provided that the dismissal was "in all respects pursuant to Rules 37 and 41(b), Federal Rules of Civil Procedure."

What other effect than dismissal on the merits could the order of dismissal have had under its verbiage? Plaintiff's counsel apparently understood the effect of the order was a dismissal on the merits, else the "Motion to Amend" would not have been filed.

II.

2. Did the Court below err in refusing to reverse the case because the Trial Court failed to charge the law as enunciated by the Supreme Court of South Dakota, despite the fact that this omission was repeatedly called to the Trial Court's attention?

3. Was the petitioner denied due process of law when (1) a judgment in its favor was set aside as "void" when neither party contended it was void and the Court itself did not state in what respect it was void; and (2) in a diversity case, the applicable state law was not charged, as required by *Erie v. Tompkins*, 304 U.S. 64?

Under *Erie*, the District Court is bound to follow the substantive law of South Dakota.

What we have not been able to get across is that the Court's instruction was not simply inadequate; it *failed to follow* the clear mandate of the South Dakota law.

In *Headlee v. New York Life Ins. Co.*, 12 N.W. 2d 313 (S.D. 1943), the leading South Dakota case on the question of jury instruction in an accidental death case, the Court said at 315:

> The burden is upon the plaintiff "to show that the specific condition precedent on which the liability is contingent has taken place", i.e. accidental death.
>
> . . .
>
> Since death by self-destruction is not an accidental but an intentional means, the evidence must by its purport negative such means.
>
> . . .
>
> ... death by self-destruction or suicide is not an exception to the contractual liability but simply fails to come within the liability created by the contract.

The Court said further in 12 N.W. 2d at 317:

> Likewise as to the opposing evidence, the jury should be instructed to weigh its credibility and effect in the usual way, and finally, upon the whole evidence, to determine whether death by accident has occurred, ***bearing in mind that if the evidence leaves their minds in such doubt that they are unable to decide the point, the verdict should be against the party upon whom the burden of persuasion rests***. Such a charge can be easily understood and enables the jury to do justice to both sides. [Emphasis ours]

A review of the entire charge by the Court set out in the Appendix hereto (Page A. 1) clearly illustrates that the requirements of ***Headlee*** were not followed.

Furthermore, with the injection by the Court of the presumption against suicide into its charge, and the reference in the charge to the "asserted defense of suicide" we believe that the Court's instructions do not only not meet the mandate of ***Headlee***, but drive the jury toward a plaintiff's verdict.

CONCLUSION

If *Erie* means anything, the Court, while not required to extract the language for its jury instruction verbatim, is nevertheless required to include in its instructions, in a clear, cogent manner so as to be readily perceived by the lay jury, the ideas or principles expressed by the case law of the state upon the particular subject. If the *Erie* doctrine and the directions set out in *Headlee* are authoritative, in this litigation over the plaintiff's claim to be paid accidental death benefits, both the plaintiff and defendants had a *right* to have the court charge the jury on the principles enunciated in *Headlee*.

The whole process of a jury trial is normally aimed toward the court's charge to the jury which is a capstone — giving significance to the turbulence and conflict of the proof which the jury has heard. Unless that charge is accurate, complete and impartial, the work of the advocates for each side is frustrated.

The charge by the Court in this case was neither accurate nor complete. It did not follow the mandate of the South Dakota authority on instructing a jury in a suit for accidental death benefits.

We respectfully urge that the Petition for Certiorari be granted.

Respectfully submitted,

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